IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

:: O R D E R ::

S.B. CIVIL WRIT PETITION NO.3298/1993

Suleman Molani
Vs.
The State of Rajasthan and Ors.

DATE OF ORDER :: 20.9.2007

PRESENT

HON'BLE MR. BHANWAROO KHAN, J.

Mr. M.C. Bhoot,for the petitioner.
Mr. O.P. Boob, Deputy Govt. Advocate.
Mr. Bheem Arora, for the respondent No.3.

The instant writ petition filed by the petitioners stating inter-alia that he cleared the examination conducted by the Rajasthan Public Service Commission (for short 'RPSC' hereinafter) for the post of Lower Divisional Clerk (for short 'LDC' hereinafter), but meanwhile the Municipal Board, Kuchaman City – respondent No.3 started the procedure for appointment for the post of Nakedar and demanded a list of eligible candidates from the employment exchange. His name figured in the list and after interview he toped the merit list. The respondent No.3 malafidely ignoring the interview result, promoted Shri Tej Singh as Nakedar from the post of Sub-Nakedar, a day prior to the date of result and evaded the claim of the petitioner for the selection

and appointment for the post of Nakedar. The respondent No.3 instead gave him appointment for the post of Naka Guard (Class IV employee) on 22.6.1981. The petitioner was given the grade of Sub-Nakedar on 22.11.1992, but has not been given the post of Sub-Nakedar. Because of shortage of LDCs in the department, his services were being utilised by the department as LDC, but he was being paid the salary of Class IV employees, which is clear from the certificate of the Executive Officer dated 10.12.1991. He is performing the duty of LDC vide order dated 15.5.1986 in the Accounts Section and is working in such capacity for last seven years. As per Rule 8 and 10 of the Rajasthan Municipalities (Subordinate and Ministerial Staff Service) Rules, 1963 (for short 'the Rules of 1963' hereinafter), the recruitment of LDCs are provided and 50% are to be promoted amongst the eligible staff and at present there are six posts to be filled by promotion amongst the eligible staff members. It was decided by the Director, Local Bodies to create post of LDC so as to give promotion to the staff members including the petitioner, but without any result. Now the post of LDC is available after one LDC Rajendra Dave was transferred from Kuchaman Municipality to Jodhpur Municipality. The respondent No.3 also called for interview at the relevant time for the post of Sub-Nakedar and the persons who appeared for Class IV employees were given appointment of Sub-Nakedar, but at that time his case was also not

considered for the post of Sub-Nakedar also and the respondent No.3 gave the appointment to the post of Sub-Nakedar to those persons, who were not called for interview for Sub-Nakedar, but were called for interview for the post of Class IV employees whereas the petitioner who was called for the post of Nakedar should have been considered for the appointment on the post of Sub-Nakedar and again injustice was caused to him by denying him the post of Sub-Nakedar. The action of the respondents is malafide, arbitrary, illegal and against the Rules. Hence, this writ petition for direction to give appointment to the petitioner to the post of Nakedar and be treated as Nakedar for all purposes from 22.6.1981 and also to regularise the services as LDC and to give him salary of LDC from the date when his services being utilised as LDC regularly.

In reply the respondent No.3 stated that the petitioner was never selected by the RPSC on the post of LDC though he appeared and cleared the examination. The petitioner was given appointment on the post of Naka-Guard equivalent to Class IV employee, on which he worked voluntarily and accepted the appointment on the said post. The petitioner neither gave any representation about the salary of post of LDC nor it was brought to the notice of the concerned authority. He has not worked on the post of LDC in the department. The promotion of Shri Tej Singh on the

post of Nakedar was legal one as he was senior most on the post of Sub-Nakedar. After promotion of Shri Tej Singh as there was no post available as Nakedar, the petitioner was offered the post of Naka-Guard which he accepted and gave his consent and he never made any complaint at that time about injustice meeted to him by not giving appointment on the post of Nakedar. The petitioner is working on the post of Naka-Guard for last 16 years and he has approached this Court after 12 years without any explanation for delay. The petitioner never discharged the duties of LDC, but obtained the certificate by manoeuring the same. The petitioner is performing the services of Class IV employee as Naka-Guard in the Accounts Section of the department and at present no vacancy of LDC is available in the department. From perusal of the certificate produced, it would be inferred that the petitioner ever discharged the duties of LDC. The respondent prayed for dismissal of the writ petition.

Heard learned counsel for the parties.

Learned counsel for the petitioner pleaded that the petitioner was interviewed for the post of Naka-Guard and topped in the merit list, but with the malafide intention and to restrain the petitioner for getting appointment on the post of Nakedar, the respondent No.3 gave promotion to one Shri Tej Singh one day prior to the result of interview. The

promotion of Shri Tej Singh was ad hoc only for six months or a candidate selected by the selection board is available whichever is earlier. The selected candidate was available but was not given appointment and it was mentioned that no post of Nakedar is available after selection of the petitioner on the post of Nakedar as the promotion order of Shri Tej Singh was issued one day prior to the result of interview. The Rule 8 of the Act of 1963 provided that the post of Nakedar must be filled by 50:50 ratio i.e. 50% by direct recruitment and 50% by promotion. The post against which Shri Tej Singh was given promotion was for direct recruitment on which the petitioner was selected but in the garb of promotion of Shri Tej Singh, the petitioner was not appointed on the post of Nakedar. The process of selection had already begain and concluded before the promotion of Shri Tej Singh. A legal right was vested in the petitioner but the same was demolished by the illegal act of the respondent No.3. Shri Tej Singh must have been reverted to make room for the petitioner, who was selected on the post of Nakedar, but instead he was only given a post of Naka-Guard (Class IV employee). So a calculated fraud was played on the petitioner to deprive him of his right.

Learned counsel further pleaded that the petitioner always performed the work of LDC uninterrupted, but he is being paid the salary of

Naka-Guard (Class IV employee). More so, the petitioner as per certificate performed the duties of LDC, for which he is entitled to get the salary of LDC and also be regularised on the said post since he is performing the duties of LDC for long period. He has a vested right to get regularisation on the post of LDC. The action of the respondent No.3 in not giving appointment to the petitioner on the post of Nakedar after due selection and also not giving the salary of LDC is arbitrary, malafide and against the Rules of Municipalities. More so, the petitioner as per certificate performed the duties of LDC, for which he is entitled to get the salary of LDC and also be regularised on the said post since he is performing the duties of LDC for long period. He has a vested right to get regularisation on the post of LDC.

Learned counsel submitted that delay caused is not on the part of the petitioner, because he only came to know about the delay and mischief only 1993 and thereafter he immediately approached the Court. The delay simply cannot defeat vested right of the petitioner.

Learned counsel for the petitioner in his support A.V. Papayya Sastry & Ors. V/s Govt. of A.P. & Ors., 2007(4) SCC 221; Hindustan Petroleum Corporation Ltd. & Anr. V/s Dolly Das, (1999) 4 SCC 450; N.Balakrishnan Vs. M.Krishnamurthy, (1998) 7 SCC 123

and Kulwant Kaur & Ors. V/s Gurdial Singh Mann (DEAD) by Lrs. & Ors., (2001) 4 SCC 262.

Per contra, learned counsel for the respondent pleaded that when the petitioner voluntarily agreed for the post of Naka-Guard in the year 1991 and worked on that post more than 12 years. Now he cannot make any complaint of the same as the cause of action in the case arose only in the year 1981. The petitioner never performed the duties of LDC in the department but he is performing the duties of Naka-Guard (Class IV employee). The Government has abolished the octroi in the Municipalities of Rajasthan and the concerned surplus staff have either been absorbed in the other department or adjusted in the other department on the equivalent post. So the post of Nakedar, Sub-Nakedar and Naka-Guard are not available in the department of the respondent. The petitioner himself has been adjusted as Gram Sewak in the service of Government of Rajasthan having higher pay-scale than that of LDC. After lapse of 12 years no relief can be given to the petitioner and since he has not worked on the post of LDC and there is no vacancy on the said post, the question of regularisation does not at all arise. He has not arrayed Shri Tej Singh as party in the writ petition and Shri Tej Singh has retired from service.

In support, the learned counsel for the

respondent cited the judgment Secretary, State of Karnataka & Ors. V/s Uma Devi (3) & Ors., 2006(4) SCC 1 and State of Orissa V/s Sri Pyarimohan Samantaray and Ors., AIR 1976 SC 2617 and pleaded that as the delay and latches have not been explained, so the petitioner is not entitled for any relief.

The factual aspect of the matter is admitted by both the parties. The petitioner was called for interview for the post of Nakedar and he topped in the merit list but one day prior to the result, the respondent No.3 promoted Shri Tej Singh and the petitioner was denied the appointment on the pretext of non-availability of the post. The petitioner was offered the post of Naka-Guard. The respondent No.3 also called for interview for the post of Class IV employees, but out of those persons, two persons were given appointment on the post of Sub-Nakedar whereas the petitioner, who appeared for the post of Nakedar was not giving appointment on the post of Sub-Nakedar also, but was appointed on the post of Naka-Guard.

The cause of action arose to the petitioner in the year 1981 and the writ petition was filed by the petitioner in the year 1993 in which only relief sought was to regularise him on the post of LDC as after the appointment he was performing uninterrupted duties of LDC. In the year 1998, the petitioner amended the writ petition and claimed the relief for

appointment on the post of Nakedar.

Undoubtedly from the admission of the parties, it is born out that the petitioner, who topped in the merit list after interview for the post of Nakedar, was not given appointment on the said post on the pretext of non-availability of the post because of promotion, given to Shri Tej Singh one day prior to the result of interview. This post was reserved for direct recruitment and his selection process has already began. Shri Tej Singh's promotion order also reveals that it was only on ad hoc basis and he has to make room available as and when the selected candidate is made available. In the instant case, the selected candidate was available and the post was for direct recruitment but the appointment was denied on the illegal pretext of non-availability of the post. The respondent No.3 having done so rejected the claim of the petitioner illegally against the rules, arbitrarily and certainly with the oblique motive. The action of the respondent No.3 by giving appointment to other persons, who were called for interview for Class IV employee, but were given appointment on the post of Sub-Nakedar was also illegal as the petitioner who appeared for the post of Nakedar could have been offered for the post of Sub-Nakedar, but this was also not been done. After due selection his case was marred by illegal action of the respondent No.3, who went beyond his authority and

against the Rules. In such circumstances, of course, the legal right has vested in the petitioner for appointment on the post of Nakedar.

The initial cause of action arose to the petitioner in the year 1981 but he slept-over the matter for long lapse of time for 12 years without seeking any remedy either in the Court or before the concerned authorities, which were competent to give any relief as desired. Twelve years is petty long time, during which, circumstances, conditions, situation, establishment everything changed for bad or good. In the instant case also the octroi was abolished in the department and surplus staff was either observed or adjusted in some other department on the equivalent post, the petitioner himself has been adjusted as a Gram Sewak in the services of the Government of Rajasthan and Tej Singh has retired from service. The respondent No.3 who issued all these illegal orders expired, so no action can be proposed against him. The petitioner has remained silent and allowed 12 years to go before making the petition for redressal of his grievance, in the meantime much water has flown in the department and the settled position of the department cannot now be unsettled as the octroi has been abolished and all surplus staff have been adjusted in some other departments on the equivalent post. Those, who are now continued in service cannot be unsettled by the petitioner at this

belated stage. The delay and latches have not been explained by the petitioner, so the relief sought about the appointment on the post of Nakedar cannot now be given to the petitioner after lapse of long 12 years.

The petitioner was performing the work of LDC is not born out from the record made available by the petitioner himself, he has produced only a Certificate (Annex.-12) in which it is only mentioned that he is to work in the Accounts Section under the casher. This certificate does not reveal that the petitioner was performing the work of LDC to work in the Accounts Section under the Casher. It cannot be inferred that the petitioner was performing the duties of LDC. Merely by stating in the petition which is empathetically denied by the respondents, it would not be inferred that the petitioner was working in the department as LDC. The petitioner never made any representation or complaint about the salary of LDC to be paid to him on the pretext of performing the duties of LDC. The petitioner also never approached to the higher authorities about injustice meeted to him. In such circumstances, he is not entitled to get himself regularised on the post of LDC since he has not worked on the post of LDC, he is not entitled for the salary also. So his case for regularisation on the post of LDC and salary for the same is not born out from the record and no relief of such nature can be

given to him.

The judgment cited by the learned counsel for the petitioner is of no avail to him because the case of A.V. Papayya Sastry and Ors. (supra), it relates to a decree which was obtained by fraud. In the instant case there is no such fraud played on the petitioner simply a mischief by not giving appointment on the post of Nakedar was played by the respondent No.3. Fraud may be defined as an act of deliberate deception in which one gain at the loss of another. This is not a case of instant matter because respondent No.3 by not giving appointment to the petitioner would not be gaining any thing out of order. Though the petitioner was put at loss, but it is certainly not a case of fraud.

The judgment cited by the learned counsel for the respondent about the delay in which it has been held that the delay by itself may not defeat the petitioner's claim for relief unless the position of the respondent is irretrievably altered and explanation, if any, about the acceptability of delay should be accepted or condoned and approached of the High Court should be justice-oriented.

Looking to the position of the instant case it can certainly be inferred that much position has changed in the department and after abolition of the

octroi throughout Rajasthan in the Municipalities and abolition of the relevant posts i.e. Nakedar, Sub-Nakedar, Naka-Guard, Revenue Inspector are no more available in the department since 1998. So position has irretrievably altered and the persons declared surplus have already been either absorbed and adjusted in the service of the Government of Rajasthan on the equivalent post or higher post. The petitioner himself has been absorbed as Gram Sewak having higher grade than that of LDC. So in case though the petitioner has legal right to be appointed on the post of Nakedar but because of on his part the delay caused and no explanation is coming forth about the same. Those who sleep-over the right should loose also. The settled position in the respondent as well as department of Government of Rajasthan where persons have been absorbed cannot now be unsettled. In such circumstances, the judgment cited by the learned counsel for the petitioner is of no avail.

For the above discussion, the relief claimed by the petitioner in such circumstances cannot be given to him and the writ petition preferred by the petitioner deserves to be dismissed.

Consequently, the writ petition stands dismissed. There shall be no order as to costs.

(BHANWAROO KHAN)J.

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